

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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VALERIE HIRATA; *et.al.*,  
Plaintiffs,  
vs.

SOUTHERN NEVADA HEALTH DISTRICT;  
*et.al.*,  
Defendants.

Case No. 2:13-cv-2302-LDG-VCF

**REPORT & RECOMMENDATION AND  
ORDER**

MOTION TO STRIKE EXPERT DR. ALISON OSINSKI  
(ECF No. 100); MOTION TO STRIKE EXPERT DR.  
JAY FINKLEMAN (ECF No. 103); MOTION TO  
STRIKE EXPERT DR. WILLIAM ROWLEY (ECF No.  
125)

This matter involves Plaintiff Valerie Hirata's civil action against the Southern Nevada Health District (the Health District) and other Defendants. Before the court are the follow motions:

1. The Health District's motion to strike expert Dr. Alison Osinski (ECF No. 100); Hirata's response (ECF No. 117); and the Health District's reply (ECF No. 135).
2. The Health District's motion to strike expert Dr. Jay Finkleman (ECF No. 103); Hirata's response (ECF No. 126); and the Health District's reply (ECF No. 153).
3. Hirata's motion to strike expert Dr. William Rowley (ECF No. 125); the Health District's response (ECF No. 143); and Hirata's reply (ECF No. 155).

For the reasons stated below, the Health District's motions to strike (ECF No. 100) (ECF No. 103) should be granted. Hirata's motion to strike (ECF No. 125) is denied.

**I. Background**

The parties are well familiar with the factual background of this action. The court will therefore summarize the expert opinions at issue.

1 Hirata's aquatics expert, Alison Osinski, received her Ph.D., master's degree, and bachelor's  
2 degree in physical education. (ECF No. 100 at 91) In addition to her education, Osinski has conducted  
3 hundreds of pool inspections, been consulted on major amusement park projects, and taught at a number  
4 of universities. (*Id.* at 92) She has also trained and supervised municipal pool inspectors and  
5 participated in over 150 aquatic accident and aquatic construction defect actions. (*Id.* at 77)

6 Osinski opines that the Health District was poorly administered and that this led to the allegedly  
7 hostile work environment that the plaintiffs were forced to endure. (*Id.* at 76-85) The Health District  
8 moves to strike Osinski's opinion as the grounds that she is not qualified to opine on the subject matters  
9 detailed in her report and that her testimony is unreliable and will not assist the trier of facts. *Daubert v.*  
10 *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d. 1311, 1315 (9th Cir. 1995).

11 Hirata's human resources expert, Jay Finkleman, received his Ph.D. and M.B.A. in industrial-  
12 organizational psychology and is a professor of industrial-organizational psychology at the City  
13 University of New York. (ECF No. 103-3at 3) Finkleman has also held a number of senior managerial  
14 positions at a number of well-known companies. (*Id.*)

15 Finkleman opines that the Health District departed from its own human resources policies as well  
16 as generally accepted human resources practices when it disciplined the plaintiffs. (*Id.* at 32) The  
17 Health District now moves to strike Finkleman's opinion on the grounds that it is unreliable and will not  
18 assist the trier of facts.  
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20 In response to Hirata's designation of Alison Osinski, the Health District designated rebuttal  
21 expert William Rowley. Unlike the other experts discussed in this order, Hirata does not move to  
22 exclude Rowley based on an alleged failure to meet the *Daubert* standards. Rather she contends that  
23 Rowley's expert opinion should be excluded since his opinion considered on information that was not  
24 disclosed in his initial rebuttal expert report. (ECF No. 125)  
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## II. Discussion

District court serve an important “gatekeeping” function that will prevent the factfinder from hearing unqualified, unhelpful, or otherwise useless expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174, 143 L.Ed.2d 238 (1999). Federal Rule of Evidence 702 sets out the guidelines a courts uses when it determines whether an individual may give expert testimony:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert reliably applied the principles and methods to the facts of the case.

### 1. Dr. Osinski is Not Qualified to Render the Expert Opinion Described in Her Report

An expert witness may be qualified to testify on a particular subject matter, but be unqualified to testify on a related subject matter. *See United States v. Chang*, 207 F.3d 1169, 1172 n.2 (9th Cir. 2000). In *Chang*, the Government prosecuted the defendant for attempting to use a counterfeit bank certificate. *Id.* at 1171. The defendant designated Professor Lausier as his expert witness. *Id.* Lausier opined that the defendant’s bank certificate was authentic, but the professor admitted that he had no formal training in identifying counterfeit securities. *Id.* The district court excluded Lausier’s testimony as the professor was not qualified to testify on the only relevant issue in the case, whether defendant’s bank certificate was authentic. *Id.* The Ninth Circuit affirmed the exclusion of Lausier’s testimony and emphasized the professor’s general expertise in international finance did not render him qualified to testify on the authenticity of bank certificates. *See id.* at 1173.

Osinski’s qualifications do not allow her to opine on the Health District’s alleged organizational deficiencies. Osinski is an accomplished professional. She earned her Ph.D. in physical education, has

1 inspected attractions at major amusement parks, and held a variety of positions within the field of  
2 aquatics. She has also been “retained as an expert in over 500 aquatic accident and aquatic facility  
3 construction defect cases.” (ECF No. 100 at 77) If Osinski’s testimony was limited the quality and  
4 thoroughness of the Health District’s pool inspections, she would be more than qualified.

5 Osinski’s proposed testimony however exceeds the scope of her qualifications. Osinski’s expert  
6 report only contains conclusions about the Health District’s alleged organizational deficiencies. (ECF  
7 No. 100 at 81). For example, she opines that: (1) “[j]ob expectations were unrealistic”; (2) “[t]he permit  
8 application process needed to be expedited”; (3) “[t]he bureaucracy needed to be streamlined to  
9 accelerate the timeline”; (4) “[t]he workplace atmosphere was toxic”; and (5) “[t]he entire episode was a  
10 waste of public funds, and compromised and will continue to negatively impact the health and safety of  
11 Clark County residents.” (*Id.* at 76-84)

12 Osinski however does not have any experience, expertise or education in human resources or  
13 human resources management. (*Id.* at 28) During her deposition, she testified that she was not a human  
14 resources specialist and had not received any specialized human resources training. (*Id.*) And apart  
15 from a year spent as a sports and aquatics supervisor in Gaithersburg, Maryland, Osinski also does not  
16 have any experience working with public regulatory agencies such as the Health District. (*Id.* at 93-94)

17 Hirata argues that Osinski’s “enormous amount of education, training, and experience in pool  
18 and spa design and environmental health reviews of public pools and spas” along with the fact that she  
19 has trained and supervised municipal health inspectors qualifies her to render her proposed opinion.  
20 (ECF No. 117 at 9-10) An expert’s general expertise in a subject area however will not automatically  
21 qualify the expert to testify on a specific sub-category within that subject area. *See Chang*, 207 F.3d  
22 1173. Like in *Chang*, Osinski’s general aquatics expertise does not qualify her to testify on the Health  
23 District’s management and human resources problems.  
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1 While Osinski may be qualified to testify on relevant issues in an aquatic accident or aquatic  
 2 construction defect action, she lacks the requisite “knowledge, skill, experience, training, or education”  
 3 to testify on the Health District’s alleged deficiencies. *See id.* The court should therefore strike  
 4 Osinski’s proposed expert testimony.

5 2. Dr. Finkleman’s Opinion is Unreliable

6 An expert’s testimony must be “the product of reliable principles and methods,” FED. R. EVID.  
 7 702, and not “mere subjective beliefs or unsupported speculation.” *Claar v. Burlington Northern R. Co.*,  
 8 29 F.3d 499, 502 (9th Cir. 1994). An expert’s own assurances that his testimony is the product of  
 9 reliable principles and methods is not conclusive on the issue of reliability. *Daubert*, 43 F.3d. at 1315.

10 Hirata has not met her burden to show that Finkleman’s proposed testimony is based on a  
 11 reliable methodology. *Lust By and Through Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594,  
 12 598 (9th Cir. 1996) (“It is the proponent of the expert who has the burden of proving admissibility.”)  
 13 Finkleman lists his opinions as bullet points. (ECF No. 103-3 at 40) For each bullet point, he generally  
 14 describes the Health District’s actions, cites to the relevant deposition transcript, and concludes that the  
 15 Health District handled the subject incident improperly. (*Id.*) Finkleman does not identify a Health  
 16 District policy or general human resources practice from which the Health District’s conduct deviated.  
 17 Instead he offers bare conclusion such as the Health District’s practices raised “red flags,” were  
 18 “retaliatory,” or deviated from the Health District’s own policies and the generally accepted human  
 19 resources practices. (*Id.*)

21 Hirata argues that the *Daubert* factors do not apply to Finkleman since his “reliability depends  
 22 heavily on [his] knowledge and experience ... rather than the methodology or theory behind it.” *United*  
 23 *States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000). While certain *Daubert* factors such as peer  
 24 review, publication, and potential error rate are inapplicable to Finkleman’s opinion, this inapplicability  
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1 does not excuse him from fully explaining how he arrived at his opinions. *See id.* (recognizing that a  
 2 gang expert “fully articulated the basis [for his opinions]” and demonstrated “that the information upon  
 3 which he relied is of the type normally obtained in his day-to-day police activity).

4 Conclusions without explanations do not satisfy *Daubert* reliability requirement. *See Claar*, 29  
 5 F.3d at 500. In *Claar*, the plaintiffs retained two medical experts who opined that there was a causal  
 6 link between workplace chemical exposure and the plaintiffs’ alleged injuries. *Id.* The district court  
 7 found the expert’s reports deficient because they “failed to explain which chemical(s) caused which  
 8 injuries.” *Id.* The district court allowed the experts to submit revised reports. *Id.* When the experts’  
 9 revised reports failed to address the previously identified deficiencies, the district court excluded the  
 10 experts on the ground that their testimony were unreliable. *Id.* The Ninth Circuit affirmed the experts’  
 11 exclusion based on unreliability. *Id.* at 502.

12 Similarly, Finkleman’s opinions are devoid of any explanation that links a specific Health  
 13 District policy to the alleged violations of this policy described in his report. (ECF No. 103-3 at 36-46)  
 14 The court should therefore strike Finkleman’s proposed expert testimony as unreliable.

### 15 3. Dr. Rowley’s Opinion Will Not be Stricken Due to Late Disclosures

16 An expert’s report must include “the facts or data considered by the witness in forming” his  
 17 expert opinion. FED. R. CIV. P. 26(a)(2)(B). “A testifying expert must disclose ... whatever materials  
 18 are given to him to review in preparing his testimony, even if in the end he does not rely on them in  
 19 formulating his expert opinion, because such material often contain effect ammunition for cross-  
 20 examination.” *Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co.*, 412 F.3d 745,  
 21 751 (7th Cir. 2005); *see also* FED. R. CIV. P. 26(a)(2)(B).

22 The Health District acknowledged that it provided Rowley with deposition summaries, a set of  
 23 documents which were not listed in Rowley’s report. (ECF No. 143); (ECF No. 143-1 at 4) Instead  
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1 Hirata first learned of Rowley's use of the summaries at Rowley's deposition. (ECF No. 125) At the  
2 hearing, the Health District stated that the summaries were intended to help Rowley navigate the  
3 thousands of pages of deposition transcripts he was required to analyze, but he did not rely on them  
4 when he formulated his opinion. Even if Rowley only consulted the summaries as a quick-reference  
5 guide, he still considered the summaries within the meaning of Rule 26. This omission from Rowley's  
6 expert report violated Rule 26's mandate that Rowley disclose all facts or data he considered. *Fidelity*  
7 *Nat. Title Ins. Co. of New York*, 412 F.3d at 751.

8 Since this court finds that Rowley's late disclosure violated Rule 26, it must now determine the  
9 appropriate remedy. "If a party fails to provide information ... as required by Rule 26(a) or (e), the  
10 party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at trial,  
11 unless the failure was substantially justified or harmless." FED. R. CIV. P. 37(c)(1).

12 Hirata will be given an opportunity to examine Rowley regarding the deposition summaries. *See*  
13 *Boliba v. Camping World, Inc.*, Case No. 2:14-cv-1840-JAD-NJK, 2015 WL 3916775 at\* 2 (D. Nev.  
14 Jun. 24, 2015) (holding that the late disclosure of an expert witness was harmless and giving the movant  
15 an opportunity to depose the expert). Dispositive motions are due on July 5, 2016 (ECF No. 149) and  
16 Hirata's responses are due approximately 51 days later (ECF No. 152). Given the extended dispositive  
17 motions' deadlines, Hirata will therefore have sufficient time to depose Rowley on the topics described  
18 in the deposition summaries. Exclusion is therefore not an appropriate remedy for Rowley's late  
19 disclosure of the deposition summaries.  
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4. Despite Denying Hirata's Motion to Strike, This Court Recommends that Dr. Rowley be Excluded Because This Court has Already Recommended that Dr. Osinski Be Excluded

After finding Rowley's late disclosure harmless, this court's analysis would ordinarily end. In this instance, this court will deviate from its standard procedure since this court has recommended that the initial expert Rowley was intended to rebut, Alison Osinski, should be excluded from trial.

A rebuttal expert's role is limited. "Rebuttal experts cannot testify in their parties' case-in-chief." *Amos v. Makita, U.S.A., Inc.*, Case No. 2:09-cv-1304-GMN-RJJ, 2011 WL 43092 at\* 2 (D. Nev. Jan. 6, 2011). "Rebuttal expert testimony is limited to presenting evidence that is intended solely to contradict or rebut evidence of the same subject matter identified by an initial expert witness." *Id.* If the court strikes Osinski's expert opinion, Rowley will not have an initial expert to rebut. *Id.* Nor will Rowley be permitted to testify in the Health District's case-in-chief. *Id.* Given the apparent futility of permitting Rowley to remain in this action, this court should exclude Rowley's expert opinion.

ACCORDINGLY, and for good cause shown,

IT IS HEREBY RECOMMENDED that the Health District's motion to strike Dr. Alison Osinski (ECF No. 100) be GRANTED.

IT IS FURTHER RECOMMENDED that the Health District's motion to strike Dr. Jay Finkleman (ECF No. 103) be GRANTED.

IT IS FURTHER ORDERED that Hirata's motion to strike Dr. William Rowley (ECF No. 125) is DENIED. If Hirata chooses to depose Dr. Rowley, his deposition must be taken on or before June 24, 2016.

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1 IT IS FURTHER RECOMMENDED that Dr. Rowley's expert opinion be EXCLUDED.

2 IT IS SO RECOMMENDED AND ORDERED.

3 DATED this 31st day of May, 2016.

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6 CAM FERENBACH  
7 UNITED STATES MAGISTRATE JUDGE  
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